Filed 5/16/19 In re Shane R. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re SHANE R. et al., Persons Coming Under the Juvenile Court Law.	B290861 (Los Angeles County Super. Ct. No. DK16548A&B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.N., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Nichelle Blackwell, Commissioner. Affirmed.

Nancy R. Brucker, by appointment of the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

K.N. (mother) appeals from the juvenile court's order terminating parental rights to her children. Mother does not challenge the juvenile court's substantive findings. She contends only that the juvenile court's order must be reversed because respondent Department of Children and Family Services (DCFS) failed adequately to discharge its duty of inquiry under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Finding no error, we affirm.

BACKGROUND

The underlying facts are not relevant to this appeal, the second in this action concerning an alleged failure to comply with the ICWA.[1]

We note only that in June 2016, the juvenile court sustained a first amended petition (petition), filed pursuant to Welfare and Institutions Code section 300,[2] on behalf of Shane R., then nearly eight years old, and his infant sister, Grace R. The sustained petition alleged, among other things, that the children were neglected and at risk of physical and emotional harm as a result of their parents'

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[1] Our decision in the prior appeal, brought solely by the children's father, resolved different ICWA–related issues than the one mother raises here. [See *In re Shane R.* (July 27, 2017, B277547) [nonpub. opn.].) Accordingly, as DCFS acknowledges, mother is not estopped from asserting her current claim. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [collateral estoppel precludes consideration of an issue actually litigated and resolved in prior action]; *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1084 [the doctrine of collateral estoppel applies in dependency actions].)

[2] Subsequent unspecified statutory references are to this code.

extensive history of domestic violence and substance abuse, and mother's untreated mental and emotional problems. (§ 300, subds. (a), (b).)

At a combined jurisdictional/dispositional hearing on June 8, 2016, the children were declared dependents of the court and removed from parental custody. Parents were ordered to complete a reunification plan and given monitored visitation. The family's efforts to reunify were unsuccessful, and reunification services ultimately were terminated in January 2018. At the selection and implementation hearing (§ 366.26) on June 20, 2018, the court terminated parental rights and cleared the children for adoption.

ICWA Evidence

At the outset of this action in April 2016, when first questioned about any possible Native American heritage, mother said, "No, my family is not Native American." However, in her response to the Judicial Council "Parental Notification of Indian status" form (ICWA–020), mother indicated that she "may have Indian ancestry," possibly "Cherokee." Father said he had "no Indian ancestry as far as [he knew]." At the detention hearing in April 2016, the court found the ICWA did not apply as to father, but ordered DCFS to notify the Bureau of Indian Affairs (BIA) along with "3 Cherokee tribes on behalf of mother."

"Notice of Child Custody Proceeding for Indian Child" (ICWA–030) forms attached to DCFS's May 2016 detention report indicate that

separate notices–identical but for child's name, and date and place of birth–were sent for each child to the Secretary of the Interior, the BIA, three Cherokee tribes and to parents. Each notice contained parents' names, dates of birth and current addresses, mother's claim of Cherokee heritage, and names, identifying information and claims of Cherokee heritage for the maternal grandparents and maternal great–grandmother. The maternal great–grandfather's name and information was included, but claimed tribes were identified as "Unknown." Information as to the paternal side of the family was listed as "Not Applicable," or "Unknown." There is no indication in the record that mother ever complained that the ICWA–030 forms lacked information she had provided about the children's Native American ancestry.

DCFS's report prepared for the June 8, 2016 adjudication hearing states only that the dependency investigator (DI) "interviewed the mother regarding ICWA and recorded all the information." The DI tried to interview the children's maternal grandmother (MGM) to obtain additional information regarding the children's Indian ancestry, but was unable to do so because MGM suffered from mental health problems or cognitive impairments. DCFS's report for the jurisdiction/disposition hearing referred to attached ICWA–030 notices, presumably attached to the earlier detention report.

In a November 29, 2016 status review report, DCFS informed the court that it had received letters in May and June 2016 from the Eastern Band of Cherokee Indians, United Keetoowah Band of Cherokee, and the Cherokee Nation of Oklahoma. Each letter indicated

that the children were not members, were not eligible for membership, and were not considered Indian children in the respective tribes. Following the hearing, the juvenile court found no reason to know the children were Indian children, as defined by the ICWA, stating: "Based on the today's report, I am looking at documents attached to the report showing that the children do not qualify for registration with any of the Native American tribes. Therefore, the minute order shall reflect a no ICWA finding is being made." In its minute order from that hearing, at which mother failed to appear, the court ordered her "to keep [DCFS], their Attorney[s] and the Court aware of any new information relating to possible ICWA status."

The section 366.26 hearing was convened on June 20, 2018. DCFS's report for that hearing noted that, on November 29, 2016, the juvenile court had found that the ICWA did not apply as to mother. At the conclusion of the section 366.26 hearing the court found the children adoptable and terminated parental rights. Mother appeals.

DISCUSSION

Mother does not take issue with the court's substantive findings or conclusions. Her sole contention on appeal is that the order terminating parental rights must be reversed because DCFS failed fully to comply with its inquiry obligations under the ICWA.

Specifically, mother complains first that, while DCFS's June 8, 2016 report for the adjudication/disposition hearing indicates that the DI "interviewed mother regarding ICWA and had recorded all of the

information," the report does not specify the date on which "mother was interviewed, what information was requested of [her], what information [she] provided, and/or whether mother [was] asked for any contact information for relatives that had been identified." Mother insists it was incumbent upon the DI to ask "those questions" and then to pursue information "leading to family members who may have additional information." Second, mother acknowledges that DCFS was unable to glean any information about the children's Indian ancestry from the MGM in mid–May 2016 due the MGM's "mental [health] or cognitive issues." But mother insists the DI should have made further efforts to ascertain such information from the MGM, but did not. Third, mother complains that DCFS failed to make ICWA–related inquiries of a maternal uncle whom mother belatedly identified as a potential placement for the children. Finally, mother claims that the ICWA–030 notices were deficient because (a) pertinent information might be missing since–because it is not known what information she shared with the DI–there is no way to know if relevant information is missing, and (b) although notice was sent to recipients "return receipt requested," there are no return receipts in the record. None of mother's assertions has merit.

1. *Controlling Law and the Standard of Review*

If the juvenile court knows or has reason to know that a child may be an Indian child, the ICWA requires that notice be sent to the appropriate tribes or, if a tribe's identity is uncertain, to the Secretary

of the Interior. (25 U.S.C. § 1912.) The requisite notice to the tribes and federal agencies must contain enough information to permit each tribe to make a meaningful determination regarding a child's status as an Indian child under the ICWA. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) DCFS has a duty to inquire and provide all *available* information regarding the child and his or her ancestors including, if known, the child's name, birth place and date, and the names and addresses of his or her parents, grandparents, and great–grandparents, and other identifying information. (*Ibid.*)

An appellant asserting error based on inadequate ICWA notice has the burden to show both that error occurred and that it resulted in a miscarriage of justice. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 ["[E]rrors in ICWA notice are subject to harmless error review"].) We review a juvenile court's ICWA findings for substantial evidence. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119-120.)

2. *Mother Has Not Demonstrated Reversible Error*

DCFS is correct that the decision *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*) is, in most respects, on point. However, we also conclude that the evidence here is even more compelling in terms of mother's failure to demonstrate reversible error. In *Rebecca R.,* a father claimed on appeal that the order terminating his parental rights should be reversed because there was no evidence to show that the social services agency inquired about his Indian ancestry. (*Id.* at p. 1428.) The court rejected the father's claim on the ground there was

evidence to support some inquiry was made, and regardless, he had failed to show prejudice. (*Id*. at pp. 1429–1430.) The appellate court concluded the father had failed "to proffer some Indian connection sufficient to invoke the ICWA," and the burden of doing so is "de minimis," he had not shown a miscarriage of justice. (*Id*. at p. 1431.) Relying on the presumption that "regularly performed" duties are carried out (Evid. Code, § 664) the court found no reason or evidence to indicate that the social services agency failed to fulfill its obligations or duty of inquiry under the ICWA, nor had the father proffered any. (*Ibid*.) The agency's reports had consistently reflected that the ICWA did not apply. (*Ibid*.)

The court continued, "[f]ather complains that he was not asked below whether the child had any Indian heritage. Fair enough. But, there can be no prejudice unless, if he had been asked, father would have indicated the child did (or may) have such ancestry." (*Rebecca R., supra,* 143 Cal.App.4th at p. 1431.) The court observed that father was presently "before [the appellate] court[,] . . . [and] nothing . . . prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not." (*Ibid*., italics omitted.) Absent such a representation, *Rebecca R.* found "the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a

matter entirely within the parent's present control. The ICWA is not a 'get out of jail free' card dealt to parents of non–Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. . . . [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal." (*Ibid.*) The evidence here is more compelling.

First, the record shows that DCFS carried out the duties that the social services agency in *Rebecca R.* allegedly failed to perform. After mother claimed possible Indian heritage and named a particular tribe, DCFS provided notice to the BIA and Cherokee tribes. A DI followed up by conducting an interview with mother to gather additional ICWA–related information, and "recorded all [that] information." The DI also tried to speak with the MGM to obtain additional information, but was unable to gather additional information, if any existed, because of her fragile mental health or cognitive impairment. Mother complains that the DI did not make further attempts to interview MGM. The record does not definitively indicate that the DI did not endeavor to try to speak again to MGM; it is merely silent on the point. Moreover, there is no evidence that the conditions suffered by MGM which prevented her from being interviewed initially had abated.

Second, letters received by DCFS from all three Cherokee tribes which were submitted to the court unequivocally stated that the children were not members of the tribes, nor eligible for tribal

membership. Once "proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, . . . then the court may find that ICWA does not apply to the proceedings. At that point, the court is relieved of its duties of inquiry and notice unless the BIA or a tribe subsequently confirms that the child is an Indian child." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 15 [resolving conflict among the courts, to hold that parent's failure to appeal prior finding by juvenile court that ICWA did not apply did not preclude parent from raising ICWA notice issues on appeal from order terminating parental rights].)

Although mother correctly notes that DCFS appears not to have questioned a maternal uncle about the children's Indian ancestry, mother also presented no indication that her brother would or could have provided such information if asked. Mother was specifically instructed to keep the court apprised "of any new information relating to possible ICWA status." Beyond what was contained in the ICWA–030 notice, there is no hint that mother ever provided additional information regarding the children's possible Indian ancestry, nor did she indicate there was any potential additional source from whom DCFS could obtain such information. On this record, we conclude that mother has failed to show a miscarriage of justice as a result of DCFS's or the juvenile court's purported failure to fulfill the duty of inquiry under the ICWA. (*Rebecca R., supra*, 143 Cal.App.4th at p. 1431.)

It is not possible to evaluate mother's claim that DCFS's ICWA notice was deficient because, as mother notes, the record does not

indicate what she told the DI when interviewed. If mother disclosed information to DCFS in her interview with the DI which she claims was not contained in the notices, such information is wholly within mother's knowledge. But mother does not now claim, and has never claimed, that information given to DCFS reflected in the ICWA–030 notice is wrong. Most importantly, she does not take issue with any information regarding the children's maternal great–grandmother, the relative mother identified as having Cherokee heritage. Rather, mother complains only that the record lacks details of what occurred during her interview.

Finally, there is no merit in mother's contention that the notice was deficient because there are no return receipts in the record. The fact that the tribes provided letters in response to the ICWA–030 notice is clear evidence that they received actual notice.

In this case, the juvenile court was put on notice that the children might be Indian children. The court ordered DCFS to comply with ICWA and notify the appropriate tribes and agencies. None of the responses received indicated either child was or could be an Indian child. Based on this information, the juvenile court determined the ICWA did not apply. The record contains no evidence that at any time after November 2016 any tribe asserted that either child was an Indian child. Therefore, under *In re Isaiah W., supra*, 1 Cal.5th at pages 14–15, the juvenile court was relieved of any further duty of inquiry and notice. (§ 224.2, subd. (b).) Mother has failed to demonstrate any basis for reversal.

DISPOSITION

The juvenile court order terminating parental rights and freeing the children for adoption is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.